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CASE NO. 88-336

# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1988**

**NORM F. HILLS, SUPT.,**

*Petitioner,*

v.

**ALBERT HUSTON FREELS,**

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## PETITIONER'S BRIEF OF SUPPLEMENTAL AUTHORITY

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On August 22, 1988 Petitioner Norm F. Hills, Superintendent of the Pickaway Correctional Institution at Orient, Ohio, filed a petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in *Freels v. Hills,* 843 F.2d 958 (6th Cir. 1988). On October 19, 1988 the Court directed Respondent to file a response. After Petitioner filed his petition, the United States Court of Appeals for the Eighth Circuit rendered a decision in direct conflict with the Sixth Circuit's decision in *Freels v. Hills,* 843 F.2d 958 (6th Cir. 1988). Petitioner hereby submits the September 12, 1988 decision of the Eighth Circuit in *Sanders v. Clarke,* 856 F.2d 1134 (8th Cir. 1988), in further support of his petition for writ of certiorari.

In *Freels v. Hills,* 843 F.2d 958 (6th Cir. 1988), the Sixth Circuit held that the failure of a defendant's appellate counsel to strictly conform to the requirements for filing an appellate brief set forth in *Anders v. California,* 386 U.S. 738 (1967), must be deemed presumptively prejudicial and is not to be measured by the deficiency-prejudice standards of

*Strickland v. Washington,* 466 U.S. 668 (1984). In *Sanders v. Clarke,* 856 F.2d 1134 (8th Circuit 1988), the Eighth Circuit addressed the same issue that faced the Sixth Circuit in *Freels v. Hills*: whether the standards for ineffective assistance of counsel set forth in *Strickland v. Washington* apply where appellate counsel did not comply with the procedures established in *Anders v. California. Sanders v. Clarke,* 856 U.S. at 1134. In its discussion of this issue the Eighth Circuit explicitly considered and rejected the holding of the Sixth Circuit in *Freels v. Hills. Sanders,* 856 U.S. at 1138. The Eighth Circuit held that a defendant must show prejudice to prove ineffective assistance of counsel where a nonconforming *Anders* brief is filed. *Sanders,* 856 F.2d at 1137-38.

The Eighth Circuit found that its holding was consistent with its decision in *Robinson v. Black,* 812 F.2d 1084 (8th Cir. 1987), *petition for cert. filed,* 56 U.S.L.W. 3198 (U.S. Sept. 29, 1987) (No. 87-211). In *Robinson* the Eighth Circuit had found that appellate counsel had not complied with *Anders* because counsel had included in his brief a discussion of why the defendant's claims were without merit and had not acted as an advocate for his client, the defendant. *Robinson,* 812 F.2d at 1086. In *Sanders v. Clarke* the Court noted that "a searching inquiry into potential prejudice was in fact made" by the Court in *Robinson. Sanders,* 856 U.S. at 1137. The Court concluded that "*Robinson* can be read as consistent with requiring a showing of prejudice before finding ineffective assistance of counsel in the *Anders* context." *Id.*

In holding that the prejudice standard of *Strickland* applies in the *Anders* context the Eighth Circuit found that noncompliance with *Anders* does not involve a situation in which the reliability of the fact-finding process is undermined or in which the degree of prejudice is impossible to determine. *Sanders,* 856 U.S. at 1138. The court noted that this Court had stated in *United States v. Cronic,* 466 U.S. 648, 659 n.26 (1984), that prejudice is presumed only where counsel's conduct has some affect on the reliability of the finding of guilt. *Id.* The Eighth Circuit found, unlike the Sixth Circuit,

that the *Anders* procedures need not be eroded by applying the *Strickland* prejudice requirement. *Id.* Finally, the court found that, since a noncomplying *Anders* brief may have correctly concluded that an appeal was without merit, it is more logical and efficient — both for the state courts and for the federal habeas courts — for the federal courts to inquire into the adequacy of the *Anders* brief and the merits of the appeal.

The reasoning of the Eighth Circuit in *Sanders v. Clarke* coincides with and supports Petitioner's argument in support of this Court's granting certiorari to review the decision of the Sixth Circuit in *Freels v. Hills.* Petitioner again respectfully submits that a writ of certiorari should be issued to review the decision of the Sixth Circuit and to address the questions presented in the petition previously filed with this Court.

Respectfully submitted,

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